

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2022/00984

In the matter between:

ELLIOT ELLIS PHILANDER

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1ST DEFENDANT

**MINISTER OF HOME AFFAIRS, IMMIGRATION,
SAFETY & SECURITY**

2ND DEFENDANT

MINISTER OF DEFENCE AND VETERANS AFFAIRS

3RD DEFENDANT

Neutral citation: *Philander v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2022/00984) [2023] NAHCMD 284 (24 May 2023)

Coram: MILLER AJ

Heard: 30-31 January 2023, 6-7 March 2023, 3, 4, 17, 25 April 2023

Delivered: 24 May 2023

Flynote: Delict – Action for damages – General damages – Based on pain and suffering, emotional and psychological trauma and loss of amenities – damages arising from an alleged assault by NAMPOL and NDF members – Court finding that the version of the plaintiff to be true and that the NAMPOL and NDF members

assaulted the plaintiff – Court awarding the plaintiff N\$50 000 for general damages and dismissing the claim for patrimonial loss of the cellphone.

Summary: The plaintiff claims for damages arising out of an alleged assault by members of the NDF and NAMPOL. Plaintiff claims an amount of N\$302 098 for pain and suffering, emotional and psychological shock and trauma, loss of amenities of life and unendurable discomfort and for patrimonial loss of the plaintiff's cellphone. Court satisfied that plaintiff proved its case on a balance of probabilities. Court further finding that the amount of N\$300 000 is too steep for compensation for the general damages and that amount of N\$50 000 is reasonable considering the circumstances of the case.

ORDER

Judgment is granted in favour of the plaintiff against the defendants for:

1. Payment in the amount of N\$50 000 jointly and severally, the one paying the others to be absolved.
2. Interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of payment.
3. Costs of suit.
4. The matter is removed from the roll and regarded as finalised.

JUDGMENT

MILLER AJ:

Introduction

[1] The plaintiff instituted action against the defendants for damages arising out of an alleged unlawful assault by members of the Namibian Defence Force (NDF) and Namibian Police (NAMPOL), jointly, on the plaintiff.

[2] The plaintiff claims an amount of N\$302 098 which is made out of N\$100 000 for pain and suffering; N\$100 000 for emotional and psychological shock and trauma; N\$100 000 for loss of amenities of life and unendurable discomfort; and N\$2 098 for patrimonial loss of the plaintiff's cellphone.

[3] Plaintiff claims that the said members of the NDF and NAMPOL were acting in the course and scope of their employment under the Minister of Home Affairs, Immigration, Safety and Security and Minister of Defence and Veterans Affairs.

[4] The defendants defended the action and denies liability. The trial commenced and the plaintiff led evidence of three witnesses. At the end of the plaintiff's case, the defendants applied for absolution from the instance, which was dismissed with costs. The defendants then proceeded to lead evidence of two witnesses of their own and closed their case.

Pleadings

[5] The plaintiff alleges in the particulars of claim that on or about 19 March 2021 at around 20h00 near Effizo Entertainment Bar in Dolam, Katutura, Windhoek, he was wrongfully and unlawfully assaulted and subjected to physical violence by NAMPOL and NDF officers. The officers were dressed in Namibian military and police uniforms. The particulars of the officers are unknown to the plaintiff.

[6] Further that the assault was unprovoked and that the assault was committed in the following manner;

'8.1 By hauling plaintiff to the ground in a violent and aggressive manner while they conducted an unlawful search on the plaintiff;

8.2 By physically assaulting plaintiff as the officers slapped him across his face and hit him on his head thereby causing an unendurable headache and vision impairment on the plaintiff's left eye;

8.3 By subjecting plaintiff to inhumane and degrading treatment by manhandling and shoving plaintiff to the concrete floor for no reason whatsoever;

8.4 By failing and/or refusing to transport the plaintiff to the nearest medical facility when he clearly and constantly asked and cried for medical assistance as a result of the injury to his left eye.¹

[7] As a result, the plaintiff alleges that he sustained bodily injury and vision impairment on his left eye, he suffered an unendurable headache which pain and suffering still persists, suffered and continues to suffer from emotional and psychological trauma and during the incident his cellphone went missing.

[8] In the plea, the defendants deny that the plaintiff was assaulted by NAMPOL and NDF officers and puts plaintiff to the proof thereof.

Plaintiff's evidence

[9] At the trial, the plaintiff gave evidence and called two witnesses, namely; Neville Katzao ('Mr Katzao') and Erwin Stuurman ('Mr Stuurman'). The plaintiff was the first witness and testified that on or about 19 March 2021, he was at Effizo Entertainment Bar in Dolam, Katutura with some friends, they had a couple of beers. The bar closed at 20h00, so he continued consuming his opened bottle of beer outside the bar. While he and his friend were sitting outside the bar, members of the Namibian Police and Namibian Defence Force then arrived in two vehicles, one being a Toyota Quantum Minibus with registration number POL9568 and the other being a military force Jeep with an unknown registration number.

[10] The officers then jumped out of their vehicles and started conducting a search on him. While they were searching him, he informed them that he was in possession of a licensed firearm and before he could show them the license for the firearm, they removed the firearm and started to assault him by hitting him in the face and on his

¹ Particulars of claim at 2-3.

head and kicking him. This assault causing him unendurable headache and pain and suffering which still persists and vision impairment on his left eye. Further, he was subjected to inhumane, cruel and degrading treatment as he was manhandled and shoved to the concrete floor for no reason. They refused to take him to the hospital. He further testifies that he lost his cellphone that was in his pocket as a result of the assault.

[11] The plaintiff testifies that he went to the police station to collect the J88 form from the police, but he was told to first go to the doctor as it is only the doctor that can request that form from the police. On 22 March 2021, he went to the doctor as indicated by the date stamp on his medical passport.

[12] The next witness for the plaintiff is Mr Katzao. He testified that he was sitting outside Effizo bar with the plaintiff when NAMPOL and NDF members arrived in two vehicles, a Toyota Quantum, with registration number POL9568 and a military Jeep. The officers did a search on them and the officers who did a search on the plaintiff found a firearm on him. The plaintiff informed them that he has a license for the firearm, but the officers started assaulting the plaintiff by slapping him in the face, beating him with their fists and violently and aggressively holding him to the ground. As a result of the assault, the plaintiff's face became swollen, his left eye was bloody and he had blood on his face. The plaintiff then managed to take out his firearm licence and handed it to the officers, at that point the officers stopped assaulting the plaintiff. The plaintiff then realised that his cellphone which he had on him prior to the officers arriving is missing. The plaintiff asked the officers where his cellphone was but they denied having taken the cellphone. The officers then returned to their vehicles and left the scene. He then accompanied the plaintiff to the Katutura Police Station.

[13] The last witness for the plaintiff is Mr Stuurman. He testified that he saw the plaintiff and some other people outside the bar. He testified that he saw a police officer arguing with the plaintiff and that the officer was wearing a yellow reflector vest with blue jeans and white sneakers. He testified that he heard the plaintiff asking the officer to give back his firearm as he already provided the officer the license. He observed that the plaintiff's left cheek was swollen and his left eye was filled with blood and blood dripping from his face. After a few minutes the officer

handed the plaintiff his firearm back and then the plaintiff realised that his cellphone was not in his pocket and asked the police officer to hand back his cellphone.

[14] He further testified that the officer got into a Namibian police Toyota Quantum mini bus that was parked in front of the bar and that he drove off with other Namibian police and Namibian defence force members. The officers were driving two vehicles, a Toyota Quantum mini bus and Namibian defence force Jeep.

Defendant's evidence

[15] Two witnesses gave evidence for the defence, namely; Warrant Officer Filipus Uugwanga ('Mr Uugwanga') and Warrant Officer Johannes Ndipulalye ('Mr Ndipulalye').

[16] The first witness for the defendant, Mr Uugwanga, testified that he is a member of the Namibian Police Force and on the evening of 19 March 2021 he was on duty. The Namibian Police Force and NDF were conducting a joint operation which he was part of. He was the driver of the police vehicle, Toyota Quantum with registration number 9568. He testified that they patrolled Katutura but could not recall the areas. He testified that they would drop members off and then meet again. He testified that he cannot recall whether someone was assaulted that evening.

[17] The second witness for the defendant, Mr Ndipulalye, testified that he is a NDF member and that he was also on duty that evening. He testified that there were two vehicles and he was driving in the same vehicle as Mr Uugwanga and that they were patrolling areas in Katutura, such as Hakahana and Greenwell. He testified that he is not aware of an assault incident taking place that evening.

Analysis of evidence

[18] I will first deal with the issue of the J88 form. The plaintiff presented a J88 form, during trial. The defendants objected to the handing up of the form as it bears no official stamp on it. This court will not consider the contents of the J88 form and regard it as inadmissible as the author thereof was not called to testify.

[19] The court is now faced with two mutually destructive versions regarding whether the plaintiff was assaulted by the NAMPOL and NDF members that evening of the 19 March 2021.

[20] In *Manja v Government of the Republic of Namibia*,² dealt with the principle of mutually destructive versions as follows;

[35] In *National Employers' General Insurance v Jagers*,³ Eksteen AJP discussed the approach to mutually destructive evidence and stated the following:

'In a civil case ... where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'

[21] Considering the evidence before court, the court is satisfied that the version of the plaintiff is true and that the plaintiff has proven his case on a balance of probabilities. This Court has found that the plaintiff was assaulted by the NAMPOL and NDF members that evening of the 19 March 2021. The plaintiff's version was corroborated by Mr Katzao who struck me as a credible and reliable witness and was unshaken in cross-examination. Mr Katzao witnessed the assault by the NAMPOL and NDF members on the plaintiff, he confirmed that the officers arrived in two vehicles, one being a Toyota Quantum mini bus with registration number 9568. Mr Uugwanga for the defendant, also confirmed that they were driving that same vehicle with the same registration number that evening in the streets of Katutura, even though he could not answer as to the exact areas they were patrolling. Mr Stuurman, although he did not witness the assault, he testified that he saw police officers and NDF members at the scene of the incident that evening.

[22] Having found that the plaintiff was unlawfully assaulted by the NDF and NAMPOL members and as a result the plaintiff sustained injuries, the court will now assess the damages suffered by plaintiff.

² *Manja v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/02299) [2021] NAHCMD 571 (07 December 2021).

³ *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D-E.

Quantum of Damages

[23] The plaintiff's claim consists of general damages for pain and suffering, emotional and psychological shock and trauma and loss of amenities of life and unendurable discomfort as well as patrimonial loss of plaintiff's cellphone.

[24] The Court will first refer to similar cases in order to determine what would be a fair and reasonable amount of compensation for the general damages.

[25] In *Meyer v Scholtz*,⁴ the defendant assaulted the plaintiff through the side window of his motor vehicle which was half open, pushed the window glass down with force and hit the plaintiff with his fists in his (plaintiff's) face a couple of times. The plaintiff was hit on his left ear, and as a result of the assault, the plaintiff's spectacles broke and his hearing apparatus got damaged and fell out of his left ear. The plaintiff claimed N\$20 000 in general damages and the court awarded N\$15 000 for pain, suffering and *contumelia*.

[26] In *Sheefeni v Council of the Municipality of Windhoek*,⁵ the assault consisted of the plaintiff being pulled forcefully and violently from the taxi he was driving, slapped, kicked and punched, and his head pushed to the curb of a street in Windhoek by City Police officials who were on patrol there, and in the process hitting his head against the curb. The plaintiff claimed N\$150 000 as general damages for assault. The court considered the amount to be exorbitant, and awarded an amount of N\$50 000.

[27] In *Haishonga v The Government of the Republic of Namibia*,⁶ the plaintiff was shot and injured by a police officer acting within the course and scope of his employment with the government. As a result of the shooting incident, the plaintiff underwent medical treatment. The court awarded the plaintiff N\$100 000 for pain and suffering.

⁴ *Meyer v Scholtz* (I 3670/2012) [2014] NAHCMD 148 (25 March 2014).

⁵ *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC).

⁶ *Haishonga v The Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2017/00359) [2019] NAHCMD 219 (3 June 2019).

[28] In the present matter, the plaintiff is claiming N\$300 000 for general damages. The amount is too steep considering the circumstances of the case. Having considered the above case law, I am satisfied that an amount of N\$50 000 is fair and reasonable for general damages.

Patrimonial loss of the plaintiff's cellphone

[29] The plaintiff testified that as a result of the assault on him, he lost his phone. The court is not satisfied that there is any evidence before court that the cellphone of the plaintiff in fact got lost due to the assault as the cellphone could have gotten lost under many circumstances. This claim is therefore dismissed.

[30] Now I will deal with costs. There is a well-established principle that costs follow the event. This principle entails that the successful party is awarded his or her costs. I could not find any reason nor was I provided with any as to why I must deviate from the general principle that costs follow the result.

[31] In the result, I make the following order:

Judgment is granted in favour of the plaintiff against the defendants for:

1. Payment in the amount of N\$50 000 jointly and severally, the one paying the others to be absolved.
2. Interest on the aforementioned amount at the rate of 20% per annum from the date of judgment to the date of payment.
3. Costs of suit.
4. The matter is removed from the roll and regarded as finalised.

P J MILLER
Acting Judge

APPEARANCES:

PLAINTIFF:

L Cloete

Of FB Law Chambers, Windhoek.

DEFENDANTS:

W Amukoto

Of the Office of the Government Attorney,
Windhoek.